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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 754.

STATE OF OHIO, EX REL. WILLIAM SMITH,
Petitioner,

vs.

HECTOR S. YOUNG, JUDGE OF THE COURT OF COMMON PLEAS, MARION COUNTY, OHIO,
and
JOHN DOE, ACTING JUDGE OF THE COURT OF COMMON PLEAS, OF MARION COUNTY, OHIO, IN ITS CASE NO. 23815,
Respondents.

BRIEF ON BEHALF OF THE RESPONDENT HECTOR S. YOUNG, JUDGE OF THE COURT OF COMMON PLEAS, MARION COUNTY, OHIO.

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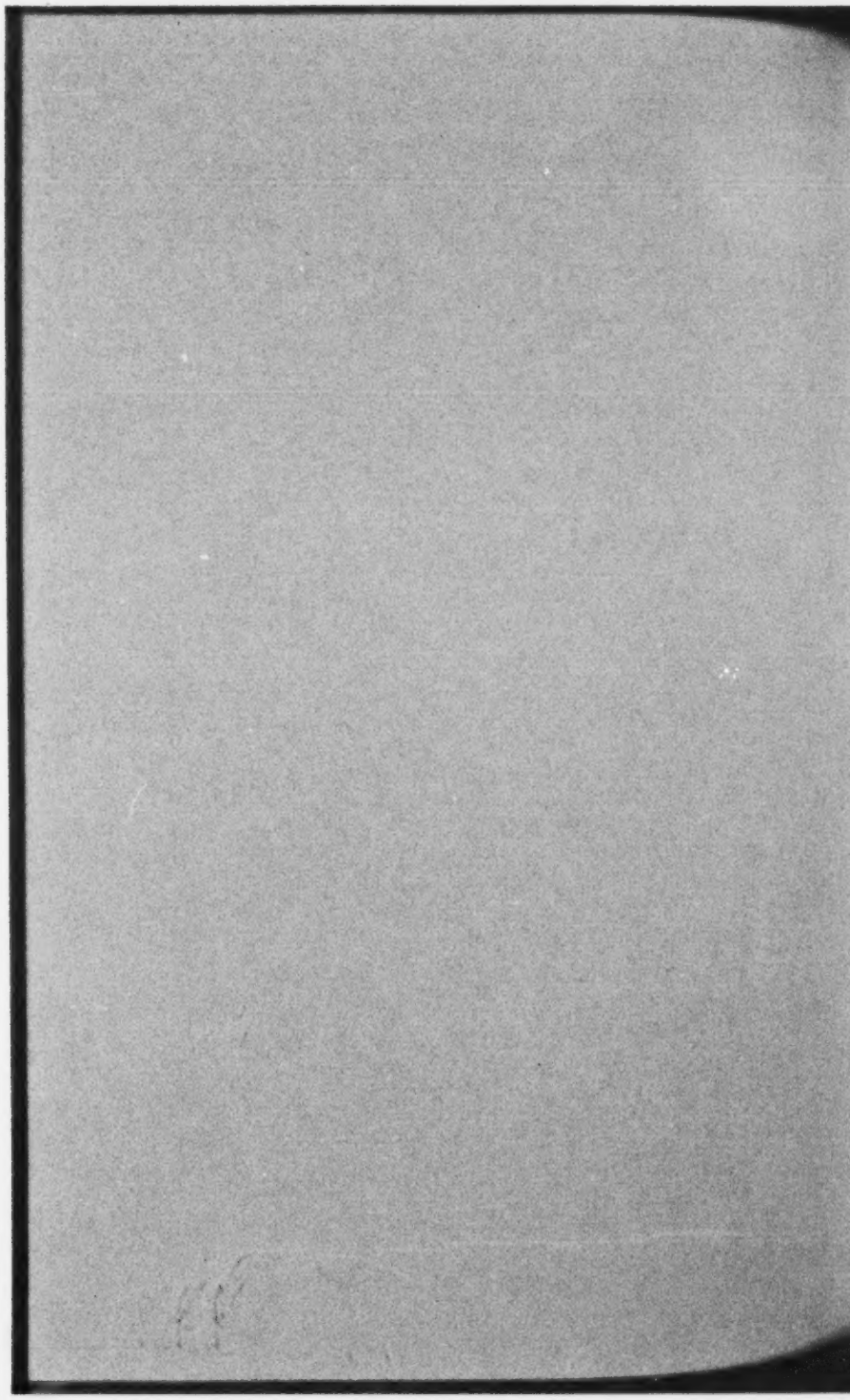

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BRIEF ON BEHALF OF THE RESPONDENT HECTOR S. YOUNG, JUDGE OF THE COURT OF COMMON PLEAS, MARION COUNTY, OHIO.

STATEMENT OF FACTS.

The petitioner has a case pending in the Common Pleas Court of Marion county, Ohio against one Richard A.

Lau. Petitioner was and is of the belief, which belief we believe to be mistaken, that he was and is entitled to a judgment by default or in the nature of a default judgment. The Court of Common Pleas of Marion county, Ohio refused to grant petitioner's motion for judgment, but instead docketed the case on the trial docket and granted the defendant Lau leave to plead. That order was appealed. The appeal was dismissed because the order was not a final order. Petitioner then filed in the Supreme Court of Ohio a petition in mandamus seeking an order to require the judge of the Court of Common Pleas to set aside the order of the court permitting the defendant Lau to plead, and to require the Common Pleas Court to enter a judgment against Lau. A complete copy of the petition is in the record. (Pages 4 to 10.) A motion was filed by the respondent judge to require the petitioner to strike from the petition filed in the Supreme Court of Ohio certain matter for the reason that the same was either conclusions of law, immaterial, irrelevant, improper or redundant. The Supreme Court of Ohio, after considering the motion, came to the conclusion that the facts as pleaded in the petition could not possibly constitute a cause of action, considered the motion to strike as a demurrer, sustained the demurrer, and dismissed the action in mandamus. (See pages 31 and 32 of the Record.) The petitioner seeks a review of that order.

QUESTIONS PRESENTED.

From an examination of the record, it would appear that there are only two questions necessary to answer in order to decide whether or not the petition for the writ of certiorari should be granted:

1. Is any federal question presented?

2. If a federal question of substance has been decided, has it been decided in a way probably not in accordance with the applicable decisions of this court?

It is the contention of the respondent that the court below did not decide any federal question of substance; that no federal question is presented, but if a federal question has been decided, it has been decided in accordance with the applicable decisions of this court.

ARGUMENT.

I. No Federal Question Is Presented.

Apparently the petitioner claims that, because the Supreme Court of Ohio refused to grant an order in mandamus directing the Common Pleas Court of Marion county, Ohio to decide a case in the way he thought it ought to be decided, he has been denied his rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States. Section 1 of the Fourteenth Amendment to the Constitution of the United States reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Petitioner refers, in his petition to this court, to the fact that he is a Negro. An examination of the record in the Supreme Court of Ohio discloses that at no time was the court below advised of the race of the petitioner. The court probably neither knew nor cared what his race might be, and there is nothing in the record to indicate that the color of the petitioner had anything to do with the decision.

The petition in the court below also discloses that the entry or order of the Court of Common Pleas of Marion

county, Ohio, which petitioner seeks to have set aside by mandamus, was an order made in a case then pending and still pending in that court, that the order of the Court of Common Pleas was not a final order; that petitioner appealed from the order, which appeal was dismissed because it was not a final order. (Pages 7, 9, 31 and 32 of the Record.) Inasmuch as the order entered in the Court of Common Pleas of Marion county, Ohio was not a final order, we are unable to determine just what petitioner has been deprived of without due process of law nor what protection under the law he has been denied.

There also seems to be some contention that Section 12285 of the General Code of Ohio is repugnant to the Constitution of the United States. That section refers to mandamus actions and reads as follows:

> "**Not to control judicial discretion.** The writ may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, but it cannot control judicial discretion."

The Ohio Legislature, by enacting that section, has simply made statutory a rule that has long been recognized by courts everywhere, to wit: that mandamus cannot be used to require a lower court to decide a case in a certain way or to control judicial discretion.

> In the Matter of John R. Flippin, et al., 94 U. S., 348, 24 L. Ed., 194;
> Morrison v. The District Court of the United States for the Southern District of New York, 147 U. S., 14; 37 L. Ed., 60; 13 S. C. R., 246.

Petitioner seems to think that the respondent judge of the Court of Common Pleas, because of some bias or partisanship on his part, was interested in the outcome of the lawsuit in Marion county, Ohio. In the event

petitioner so believes, he has his remedy under the law of Ohio, and he is not compelled to have his case tried before the respondent judge.

Section 1687 of the General Code of Ohio which reads as follows:

> **"Change of venue in Common Pleas Court and Superior Court of Cincinnati; when.** When a judge of the Common Pleas Court or of the Superior Court of Cincinnati is interested in a cause or matter pending before the court in a county of his district, or is related to, or has a bias or prejudice, either for or against, a party to such matter or cause, or to his counsel or is otherwise disqualified to sit in such cause or matter, on the filing of an affidavit of any party to such cause or matter, or of the counsel of any party, setting forth the fact of such interest, bias, prejudice or disqualification, the clerk of the court shall enter the fact of the filing of such affidavit on the trial docket in such cause and forthwith notify the chief justice of the Supreme Court, who shall designate and assign some other judge to take his place. Thereupon the judge so assigned shall proceed and try such matter or cause. The affidavit herein referred to shall be filed not less than three days prior to the time set for the hearing in such matter or cause."

Petitioner had, and still has, the remedy to which the law entitles him—to have his case, pending in the Common Pleas Court of Marion county, Ohio, tried on the merits before the nisi prius court, and it is evident that remedy is not satisfactory to him.

II. The Decision of the State Court is in Accord With the Applicable Decisions of This Court.

We believe that no federal question of substance has been decided by the state court, but if by any chance we are mistaken and a federal question of substance has been decided, it has been decided in accordance with the applicable decisions of this court. Section 12285 of the General Code of Ohio, as previously quoted, provides that mandamus shall not be used to control discretion. This court has recognized that rule and has held that mandamus cannot be used to require a lower court to decide a case in a certain way.

In the Matter of John R. Flippin, et al., supra.

Nor can mandamus be used as a writ of error or appeal.

Morrison v. The District Court of the United States for the Southern District of New York, supra;
In re Hawkins, 147 U. S., 486, 37 L. Ed., 251.

The Ohio courts have always followed the same rule.

Ex Parte Black, 1 O. S., 30;
State, ex rel. Sherwood, v. Hoffman, J., 95 O. S., 144;
State of Ohio, ex rel. Jaster, Jr., Director of Highways, v. Kautz, J., 131 O. S., 103.

Nor will the Ohio courts permit mandamus to be substituted for an appeal. Ohio does not permit an appeal except from a final order.

Hoffman v. Knollman, 135 O. S., 170.

This rule seems to be in accord with the rule of this court.

Laclede Gas Light Co. v. Public Service Commission of Missouri, 304 U. S., 398, 82 L. Ed., 1422;
Clinton J. Hutchins, Trustee, v. William W. Bierce, Ltd., 211 U. S., 429, 53 L. Ed., 267.

CONCLUSION.

In closing, we wish to point out that the Supreme Court of Ohio has not been unfair to this petitioner. In the case of Smith v. Lau, 135 O. S., 191, that court overruled its former decisions and gave the petitioner the right to sue Lau for the injuries that he claimed and remanded that case to the Court of Common Pleas of Marion county, Ohio, for further proceedings according to law, to wit: trial. In the case at bar the Supreme Court of Ohio has decided that the petitioner must proceed with that trial before asking further relief from that court. Inasmuch as it appears from the record that the Supreme Court of Ohio, in the case at bar, has decided no federal question of substance and that its decision is in accord with the applicable decisions of this court, it is respectfully submitted that the writ should be denied.

Respectfully submitted,
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